

**DOCUMENT RESUME**

**08147 - [C3468571]**

**[Unbalanced Bid Did Not Preclude Contract Award]. B-192794.  
December 8, 1978. 5 pp.**

**Decision re: Dement Construction Co.; Universal Construction Co.  
; by Robert F. Keller, Acting Comptroller General.**

**Contact: Office of the General Counsel: Procurement Law I.  
Organization Concerned: Department of the Army: Corps of  
Engineers.**

**Authority: 31 U.S.C. 529. 54 Comp. Gen. 242. 55 Comp. Gen. 231.  
Defense Acquisition Regulation 7-603.37. Defense Acquisition  
Regulation 2-407.8. 4-191786 (1978).**

**A protester contended that award of a contract may not result in the lowest cost to the Government because the awardee's bid was unbalanced. A mathematically unbalanced bid may be accepted where Government estimates are reasonable and there is no reasonable doubt about its resulting in the lowest cost. An allegation that an understanding between the agency and the awardee prior to award concerning progress payments constituted after the fact negotiations was without foundation since the bidder was entitled to the award and there were no negotiations determining such entitlements. (HFN)**

**DECISION**

*J. K. ...*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

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*8571*

FILE: B-192794

DATE: December 8, 1978

MATTER OF: Dement Construction Company; Universal  
Construction Company

## DIGEST:

1. Bid which is mathematically unbalanced may be accepted for award where reasonableness of Government estimates is not challenged and Government will order all 95 items on bid schedule during course of construction, since there is not reasonable doubt that award will not result in lowest cost to Government.
2. Allegation that understanding between procuring agency and low bidder prior to award as to manner in which progress payments would be made constituted after the fact negotiations is without foundation as bidder was entitled to award as low responsive bidder and there were no negotiations as the term is ordinarily used, that is, determining entitlement to award.

Dement Construction Company (Dement) has protested the award of a contract by the United States Army Corps of Engineers (Army) to the Universal Construction Company (Universal) under invitation for bids (IFB) No. DACWG2-78-B-0106.

The contract is for the relocation of two and one-half miles of railroad track belonging to the Southern Railway System and the construction of two steel bridges. This work is being performed in connection with the development of the Tennessee Tombigbee Waterway Project in Mississippi and Alabama.

Five bids were received in response to this IFB. The low bid of \$15,902,487.87 was submitted by Universal. Dement's bid of \$16,207,834.80 was second low.

Through inadvertence, the Army failed to include in the IFB the standard mobilization and preparatory

work clause set out in Defense Acquisition Regulation (DAR) § 7-603.37 (1976 ed.) and a separate bid item in the bid schedule for mobilization and preparation.

Upon review of the two low bids, the Army determined that both bids had been mathematically unbalanced because of the absence of a separate line item for mobilization and preparation. The first two items of work to be performed under the contract were line items 1D.1 and 2A.1 which are "Contractor-Furnished Government Facilities" and "Clearing and Grubbing," respectively. Following are the bids of Universal and Dement for these items:

<u>Item</u>	<u>Government Estimate</u>	<u>Universal</u>	<u>Dement</u>
1D.1	\$ 22,600	\$2,749,318	\$ 30,000
2A.1	202,860	120,505	1,192,000

We believe it is clear from the above figures that both bidders unbalanced their bids for early items of work in an effort to recover the sums that must be expended for mobilization and preparation prior to actual commencement of construction.

Faced with the above situation, the contracting officer determined that the solicitation should be canceled and a new IFB issued containing the mobilization and preparatory work clause and a separate bid item for it. The reasons the above decision was made were that the omission of the clause and bid item had encouraged the unbalanced bidding and to award a contract to either bidder would result in an advance payment of funds for work not yet performed.

Following the cancellation, both Universal and Dement protested to our Office. Universal protested the cancellation of the IFB and the proposed resolicitation. Dement protested that Universal's bid was unbalanced and, therefore, should not be considered for award.

Subsequent to the contracting officer's decision to cancel the solicitation, a further review of the situation was made and the Army decided to reinstate the IFB and make award to Universal. The rationale for this decision was explained by the Army as follows:

"Pursuant to the terms of the contract between the Government and Universal, as the successful bidder for this contract award, the Government will make payments to the contractor for work accomplished and payments earned in accordance with the clause entitled 'Payments to Contractor (1976 MAR),' as authorized by DAR 7-602.7. Pursuant to subsection (b) of this clause, the Contracting Officer may request the contractor to furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested in order to provide a basis for determining progress payments under this clause. In the preparation of estimates the Contracting Officer at his discretion may authorize material delivered on the site and preparatory work done to be taken into consideration.

"Under this solicitation then, the Government intends to award the contract to Universal Construction Company, and pursuant to the terms of the 'Payments to Contractor' clause, it intends to pay for bid item ID.1 over the life of the contract by paying the contractor the amounts earned in the performance of this work plus a percentage payment factor of 21 percent until the entire bid item (\$2,749,318 minus \$30,000) is paid to the contractor. Universal is agreeable to this payment arrangement."

On October 26, 1978, approval was given by the Office of the Chief of Engineers for award of the contract to Universal notwithstanding the pendency of

the protest pursuant to DAR § 2-407.8(b)(3) (1976 ed.). On October 30, 1978, award was made to Universal based on the above-described progress payment agreement.

Dement's protest contends that Universal's bid is so unbalanced that the award to Universal may not result in the lowest cost to the Government.

Our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each item carries its share of the cost of the work, plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Mobilease Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

We believe it is clear that the Universal bid of \$2,749,318, on item 1D.1 is mathematically unbalanced in view of the Government estimate of \$22,600 and the bids of the other bidders which ranged from \$11,000 to \$100,000. Item 1D.1 required the bidder to furnish the Government office facilities consisting of a 10-foot by 40-foot trailer to be paid for on a lump-sum basis. However, we do not find the bid to be materially unbalanced. The object of the contract is the relocation of the railroad and in order to perform the relocation all 95 of the bid items will be ordered by the Government and utilized by the contractor in the construction. Dement has not contended that the quantity estimates for the 95 items are unreasonable or erroneous. Therefore, this is not the type of unbalanced bid situation our Office faced in Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164, where we held that because of inaccurate estimates, the solicitation should be canceled. Accordingly, we

find that while Universal's bid is mathematically unbalanced, it is not materially unbalanced and award to Universal does not raise a reasonable doubt that the award will not result in the lowest cost to the Government.

Dement also argues that the use of the above mentioned payment plan to remove the irregularity in the Universal bid constituted "after the fact" negotiations by the Army with Universal. Since Universal's total price for all the work was unchanged and it was entitled to award as the low responsive bidder, there were no negotiations in the sense that the term ordinarily is used, that is to determine entitlement to award, but rather an understanding in advance as to how progress payments would be determined under the "Payments to Contractor" clause. Accordingly, we see no prejudice to Dement or any other bidder.

Dement further argues that adding 21 percent to each item of Universal's bid could create the possibility of additional costs to the Government for any overrun in quantity of certain items. We do not see this problem. The Army is not adding 21 percent to each of the bid items but will add 21 percent to each progress payment approved by the contracting officer until the amount of \$2,719,318 is paid to Universal. Therefore, this ceiling of \$2,719,318 would forestall the problem envisioned by Dement.

For the foregoing reasons, the protest of Dement is denied and our Office has no objection to the award to Universal and the use of above-noted payment method. This decision is reached taking into consideration the recognition by the Army of the need to avoid any advance payments in violation of 31 U.S.C. § 529 (1976) and its adherence to the previous decision of our Office in the matter of M&B Contracting Company - Reconsideration, B-191786, September 8, 1978, 78-2 CPD 179.

  
Acting Comptroller General  
of the United States